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December 11, 2017

By Mail: Office of Regulations and Interpretations,
Employee Benefits Security Administration
Room M-5655
U.S. Dept. of Labor
200 Constitution Avenue NW
Washington D.C. 20210

Re: Re-Examination of Claims Procedure Regulations for Plans Providing Disability Benefits
RIN No.: 1210-AB39
Regulation: 29 C.F.R. §2560.503

Dear Deputy Assistant Secretary Hauser:

I am writing to discourage the Department from modifying or further delaying the final disability claims regulations (Final Regulation on Claims Procedure for Plans Providing Disability Benefits, 81 Fed. Reg. 92316 (Dec. 19, 2016)) that are now scheduled to go into effect on April 1, 2018.

I have represented hundreds of individuals in lawsuits and/or pre-suit appeals for disability benefits under the ERISA statute. Recently, I helped litigate *Fontaine v. Metro. Life Ins. Co.*, 800 F.3d 883 (7th Cir. 2015), upholding the validity of Illinois's ban on discretionary language in group policies of health disability insurance. We were fortunate to have the DOL provide *amicus* support in that case. In addition, I have drafted *amicus* briefs in support of the plan participants in *Montanile v. Bd. of Trustees of the Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651 (2016), and *Rochow v. Life Ins. Co. of N. Am.*, 780 F.3d 364 (6th Cir. 2015) (en banc), and I am a frequent speaker on disability benefit claims at conferences of the American Bar Association Employee Benefits Committee. I am, thus, well-poised to comment on the importance of these regulations and their impact on ERISA plan participants and administrators alike.

While I am grateful for the opportunity to comment on the Department's re-examination of the costs of the final rules governing disability claims, the concerns raised by the industry are not new. Rather, these objections appear to be simply re-argument of the merits of the final rules. Where those rules are based on policy choices that have been made by Congress, by this Department, and by the federal courts interpreting ERISA, another argument about the merits is unnecessary.

Nevertheless, I will address the objections that have been raised that I feel are most in need of a response

Costs Will Not Increase

The industry claims if the final rules go into effect there will be an increase in costs that will increase premiums resulting in less access to disability benefits. These assertions do not ring true.

This costs argument was made in various industry comments to the proposed rules before final adoption. The Department concluded that costs would not outweigh the benefits. The current cry of increasing costs is an argument that has already been considered and rejected. An agency is not required to "conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Michigan v. Environmental Protection Agency*, 135 S. Ct. 1699, 2711 (2015).

Nonetheless, the Department has asked for data addressing whether costs increased in response to the last set of rules applying to ERISA disability plans that became effective in 2002. In fact, the Department can rely upon information supplied by its own Bureau of Labor Statistics. https://www.bls.gov/opub/btn/volume-4/disability-insurance-plans.htm.

The data shows that access and participation in employer-based disability insurance has *increased*, not decreased, between 1999 and 2014. This increase occurred despite that employment in the service industry has increased, an industry in which employees are the least likely to have access to employer-based disability coverage. This increase also occurred despite the 2000 disability claims regulations and a series of court decisions addressing conflicted decision-making, deemed exhaustion, the need to discuss and explain adverse benefits decisions, and the participants right to respond to new evidence. I would therefore be suspicious of any data supplied by the industry now that suggests employers would abandon disability coverage due to the costs of codifying these principles. This BLS document also demonstrates that the cost of disability insurance is extremely modest. Thus, even if costs did increase, the increase would be so small that it is unlikely to make any difference.

The Department has also asked for data about whether disability premiums increased in response to the adoption of statutory bans on discretionary language clauses in disability policies by some states. Notably, during the time period of the BLS study, many states enacted discretionary clause bans. This includes but is not limited to Arkansas Admin. Code 054.00.101-4 (2013); Cal. Ins. Code §10110.6 (2012); Colo. Rev. Stat. §16-3-1116 (2008); 50 Ill. Admin. Codes 2001.3 (2005); Md. Code ann. Ins. §12-211; Mich. Admin. Codes. R. 500.2201-2202 (2007); R.I. Gen. Law §§ 27-18-79; Tex. Admin. Code §3.1202-1203; Tex. Ins. Code §1701.062, §1701.002 (2011); WAC §284-96-012 (2009). Notwithstanding these statutory developments, access and participation in disability plans increased according to the BLS data.

Also, during the period covered by the BLS document, two major insurers with significant market share, UNUM and CIGNA, were examined by the states for poor claims handling and became subject to fines and Regulatory Settlement Agreements that raised the bar for their claims administration.
http://www.maine.gov/pfr/insurance/publications_reports/exam_rpts/2004/unum_multistate/unum_multistate.html;

http://www.maine.gov/pfr/insurance/publications_reports/exam_rpts/2009/pdf/cigna_mcreport_2009.pdf.
https://www.insurance.ca.gov/0400-news/0100-press releases/2013/release044-13.cfm.
Nonetheless, during this period access and participation increased.

Given this history, I dispute any claim that costs will increase in response to the modest changes in the final rules. Accordingly, I urge the Department not to change the final rules in response to the industry's strained logic that the costliness of the final rules will impact access to disability benefits in the workplace.

The Benefits Outweigh the Costs

The Department is not required to avoid all regulations that affect the market in some way. *Mkt. Synergy Grp. v. United States Dep't of Labor*, 2016 U.S. Dist. LEXIS 163663, 2016 WL 6948061 (D. Kan. 11/28/2016). As well, it is not clear that, whatever the costs of the final rules, they would outweigh the benefits. The Department has already articulated its purposes – to make sure claims are fairly adjudicated and to prevent unnecessary financial and emotional hardship. The Department should ignore the industry's invitation to abandon these purposes. Moreover, these benefits cannot be outweighed by costs where the ERISA process is already so slanted in favor of the plan administrators.

ERISA disability claimants who are denied their benefits face a process that is far below the standard for regular civil disputes. These procedural hurdles include: (1) there are no jury trials; (2) there is a closed record from the claims process that can rarely be supplemented in litigation; (3) courts often apply an unfavorable standard of review, and (4) there are no remedies to discourage unfair and self-serving behavior on the part of plans. This will never be a level playing field much less one that favors plan participants. *United States v. Aegerion Pharmaceuticals, Inc*., 2017 WL 5586728, at *7 (D. Mass. 11/20, 2017) ("The insurance industry found it could largely immunize itself from suit due to the Employee Retirement Income Security Act ('ERISA')."") Even with the final rules in place, plan participants will not have achieved the "higher-than-marketplace standards" that the Supreme Court insists are required in processing ERISA claims. *MetLife v. Glenn*, 554 U.S. 105, 115 (2008). Any consideration the Department makes about the benefits of the final rules relative to costs should take this "higher-than-marketplace" expectation into account and acknowledge that ERISA exists to protect plan participants.

The Department has already acknowledged that the disability claims industry has been needlessly adversarial toward ERISA disability plan participants and has received many comments to that effect. The industry's argument that the final rules are bad for participants – despite all evidence to the contrary - cannot be taken seriously. The industry is not a credible advocate for participants.

Furthermore, from the perspective of plan participants, an inexpensive but illusory disability plan is worse than no plan at all. It is important to note that when a disability claimant is unfairly denied benefits that he/she thought was promised through an employer's plan, it is too late to go out and purchase private individual insurance to cover the risk of becoming destitute. Disabled claimants are often shocked when they are told about ERISA's procedural hurdles. So, to the extent that

increased protections bring disability claims administration in line with the reasonable expectations of the employee-participants, the costs are outweighed by the benefits.

If there are costs associated with the final regulations, these costs could and should be tolerated in the name of supplying a modicum of protection for plan participants.

I ask that you take these comments into consideration and forbear on modifying or further delaying the enactment of the 2016 amendments to the disability claims regulations.

Very Truly Yours,

Martina B. Sherman

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